A **SAL-MAL (SABAH) CORPORATION SDN BHD**

v.

KORPORASI KEMAJUAN PERIKANAN DAN NELAYAN SABAH

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[SUIT NO: K22-142-1998-I]
19 MARCH 2010

C ***CIVIL PROCEDURE:*** *Res judicata - Issues, similarity of - Legal issues raised in earlier suit not similar to present issues - Discussion of merits of case in earlier suit merely obiter dicta - Principle of res judicata not applicable*

D ***CONTRACT:*** *Breach - Agreement to transfer land - Innocent party entitled to remain in possession of land - Party in breach estopped from removing innocent party from land - Declaration for land to be transferred to innocent party*

E ***CONTRACT:*** *Performance - Reciprocal promises - Whether breach of contract established - 6th defendant refusing to perform its part of bargain - 1st defendant willing to perform its part of bargain - 6th defendant not interested in requiring 1st defendant to perform 1st defendant's obligation - Whether 6th defendant had breached contract*

F The 1st defendant owned a parcel of land (CL 015426801). In early 1980 it was discovered that the 6th defendant had entered into the 1st defendant's land to construct ponds without any authority from the 1st defendant. The 6th defendant was setting up an aquaculture project on an adjoining State Land with an area of about 50 acres and had encroached onto the 1st defendant's land. The 1st
G defendant demanded that the 6th defendant vacate and remove all structures erected thereon. Negotiations between the parties led to a 'trespass settlement agreement' on the following terms: (i) the 1st defendant was to sell its land to the 6th defendant; (ii) the adjoining land measuring 50 acres (which was State Land) was to
H be taken over by the 1st defendant in exchange with the development of replacement ponds by the 1st defendant in Weston on the land to be provided by the 6th defendant; (iii) the 6th defendant be allowed to continue with their project on the 1st defendant's land and to legalize their illegal occupation, whereof a
I sublease was created for a duration of ten years at a rental of

RM10,000 per year. To implement the settlement agreement, the 1st defendant made a formal application for the adjoining 50 acres. This application was approved by the Ministry of Natural Resources which instructed the 1st and 6th defendants to enter into an agreement for the exchange for the 50 acres. The 1st defendant then asked the 6th defendant for the signing date of the agreement and for the replacement ponds. However, the 6th defendant did not respond despite the fact that the 6th defendant had obtained the land for the replacement pond in Weston. For a period of ten years the 6th defendant occupied the 1st defendant's land without paying any rentals and in total disregard of their obligations under the sublease agreement. The 6th defendant never executed the trespass settlement agreement. Meanwhile the Director of Land and Surveys alienated the 50 acres adjoining land to the 6th defendant. Relying on the Director's letter confirming that the title deed for the 50 acres would be transferred and in accordance with the terms of the trespass settlement agreement, the 1st defendant took possession of the 50 acres and its own land in anticipation that the title deed for the 50 acres would be transferred by the 6th defendant to the 1st defendant. The 1st defendant sought a declaration that the 1st defendant was the rightful owner of the land premised on the agreement between the parties. The 6th defendant raised the issue of *res judicata* relying on suit K4/1992 (which was between the 1st defendant and the Director of Lands and Surveys). The 6th defendant also contended that since no formal agreement was executed by the parties, there was no concluded agreement.

Held (for the 1st defendant):

(1) The principle o*f res judicata* did not apply. Though the facts of suit K4/1992 related to the same 50 acres land, the legal issues there were not the same as here. There the 1st defendant here appealed against the decision of the Director of Lands and Surveys to alienate the 50 acres land to the 6th defendant here. The learned judge's discussion on the merits of the case was *obiter dicta* and cannot be used to invoke the principle of *res judicata*. The learned judge's findings also had no bearing on this case which concerned solely of the alleged trespass settlement agreement reached between the 1st and 6th defendant. In that case the learned judge was more concerned with the power of the Director of Lands and Surveys under

s. 9 of the Land Ordinance (Sabah). There may have been some discussion on the alleged trespass settlement agreement but no oral evidence was called to determine whether there was a binding agreement between the 1st and 6th defendant. (paras 7, 8 & 9)

(2) The fact that the 6th defendant was not interested in buying the 1st defendant's land had no bearing on the agreement reached between the parties. This was a matter of choice for the 6th defendant. As for the development of a replacement pond in Weston the 1st defendant was willing to perform its part of the bargain and the fact that the 6th defendant was not interested in requiring the 1st defendant to perform its obligation was of no significance. The 6th defendant had breached the agreement. (para 20)

(3) The 1st defendant was entitled to possess and remain in possession of the whole of the land as long as it wished to do so and the 6th defendant was estopped from removing the 1st and 3rd defendants from the said land. The 6th defendant had to transfer the whole of the interest in the said land to the 1st defendant free from any and all claims and/or encumbrances within 30 days. The 6th defendant was also injuncted from entering or remaining on the said land and from disturbing or interfering with the 1st defendant's possession and quiet enjoyment of the said land. (para 22)

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Foo Sam Ming v. Archi Environ Partnership [2004] 1 CLJ 759 CA ***(refd)***
Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***
Masters v. Cameron [1954] 91 CLR 353 ***(refd)***
Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands And Surveys, Sabah [1994] 3 CLJ 229 HC ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Tindok Besar Estates Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Land Ordinance (Cap 68) (Sabah), s. 9

For the 1st defendant - Chung Jiun Dau; M/s Chung & Associates
For the 6th defendant - Mohammad Nor Yusof (Adzimah Pg Adnan with him); M/s Johari & Zelika

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] This is the trial of a counterclaim by the 1st defendant against the 6th defendant. The relief sought in a nutshell is for a declaration that the 1st defendant is the rightful owner of a parcel of land registered under PL016290212 premised on an alleged agreement entered between the 1st and 6th defendant. The 6th defendant denies the claim of the 1st defendant on the ground that there was no binding agreement as a formal agreement had not been executed by the parties.

Background Facts

[2] The 1st defendant owns a parcel of land measuring 13.14 acres (CL 015426801) at Kuala Inanam. In early 1980 it was discovered that the 6th defendant had entered into the 1st defendant's land to construct ponds without any authority from the 1st defendant. The 6th defendant was in fact in the process of setting up an aquaculture project on an adjoining State Land with an area of about 50 acres and had encroached onto the 1st defendant's land. As a result of this trespass the 1st defendant instructed its solicitors to write to the 6th defendant to demand that they vacate, dismantle and remove all structures erected thereon within 14 days from the date of the letter.

[3] As a result of the letter by the 1st defendant's solicitors, negotiations were conducted between the 6th defendant and 1st defendant. Mr Edward Goh (DW1) represented the 1st defendant while Datuk Abd Ghani Rashid (DW3) who was the then general manager of the 6th defendant represented the 6th defendant in the negotiations. As the 6th defendant is a statutory body established by Korporasi Kemajuan Perikanan dan Nelayan Sabah Enactment 1981, the Sabah State Government was also involved in the negotiations. These negotiations resulted in a so called amicable 'trespass settlement agreement', the terms of which are as follows:

a. The 1st defendant is to sell its land to the 6th defendant,

b. The adjoining land measuring 50 acres (which was still a State Land then) is be taken over by the 1st defendant in exchange with the development of replacement ponds by the 1st defendant in Weston on the land to be provided by the 6th defendant,

A c. The 6th defendant be allowed to continue with their project on the 1st defendant's land and to legalize their illegal occupation, a sublease was created for a duration of ten years effective from 1 January 1982 at a rental of RM10,000 per year.

B **[4]** To implement the settlement agreement, the 1st defendant at the behest of a letter dated 28 September 1983 from the Ministry of Natural Resources made a formal application for the adjoining 50 acres under PT 83010208. This application was approved by the Ministry of Natural Resources by a letter dated 24 January 1984. The Ministry had also by a letter dated 25 September 1984 C instructed the 6th defendant and the 1st defendant to enter into an agreement in respect of the exchange for the 50 acres. Pursuant to that instruction, the firm of Chin Lau & Wong was instructed to and did prepare a formal agreement for the 1st and 6th defendant to execute. On 28 February 1985, the 1st defendant wrote to the D 6th defendant requesting them for the signing date of the agreement and asking them for the replacement ponds. However, the 6th defendant did not respond despite the fact that the 6th defendant had obtained the land with acreage of 163.98 acres for the replacement pond in Weston under Title No. PL 176291339 E which was registered on 27 October 1999. For a period of ten years from 1982 to 1992, the 6th defendant was occupying the 1st defendant's without paying any rentals and in total disregard of their obligations under the sublease agreement. The 6th defendant never executed the trespass settlement agreement. Meanwhile the F Director of Land and Surveys alienated the 50 acres adjoining land to the 6th defendant with tenure of 50 years as opposed to six years. Relying on the Director's letter dated 26 February 1992 confirming that the Title Deed for the 50 acres would be conveyed by way of transfer and in accordance with the terms of the trespass settlement agreement made between the parties in 1980, the G 1st defendant took possession of the 50 acres (PT 83010208) and its own land in March 1992 in anticipation and in expectation that the Title Deed for the 50 acres would be transferred by the 6th defendant to the 1st defendant.

H **[5]** The 1st defendant had since remained in possession of the 50 acres adjoining land.

Issues

[6] From the evidence and submission made by counsel it is my I view that the determinative issues are these:

a. Is the 1st defendant's claim barred by the principle of *res judicata* by virtue of the related case between the 1st defendant and the Director of Lands and Surveys – Suit K4 of 1992?

b. If the answer to issue 1 is in the negative, is there a binding agreement between the 1st and 6th defendant in respect of the 50 acres land?

Issue 1

Is The 1st Defendant's Claim Barred By The Principle Of Res Judicata By Virtue Of A Decision Related Case Between The 1st Defendant And The Director Of Lands And Surveys – Suit K4 Of 1992?

[7] Counsel for the 6th defendant contends that the dispute in K4/1992 is similar to the dispute in the present case and even though the 6th defendant was not a party in that suit, that decision binds the 1st defendant. I have read the judgment of the learned judge in that case (*Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands And Surveys, Sabah* [1994] 3 CLJ 229) and it is my view that the principle of *res judicata* does not apply and I say so for the following reasons. Though the facts relates to the same 50 acres land, the legal issues there are not the same as here. There the 1st defendant here (who is the appellant there) appealed against the decision of the Director of Lands and Surveys to alienate the 50 acres land to the 6th defendant here. The learned judge found as a fact that the appeal to the court was filed out of time and on that ground alone the learned judge dismissed the appeal. However the learned judge out of caution assumed he was wrong on 'time' issue proceeded to discuss the merits of the appeal. I agree with counsel for the 1st defendant the learned judge's discussion on the merits of the case is *obiter dicta* and cannot be used to invoke the principle of *res judicata*. Be that as it may, it is my view that the learned judge's findings there have no bearing on this case which concerns solely of the alleged trespass settlement agreement reached between the 1st and 6th defendant. In that case the learned judge was more concerned with the power of the Director of Lands and Surveys under s. 9 of the Land Ordinance (Sabah). The learned judge had held that once the Director had exercised his discretion to alienate State land and when the offer to alienate had been accepted by the applicant, nobody including the Chief Minister can challenge that exercise of discretion. That was

A the principle expounded in that case and nothing else. There may have been some discussion on the alleged trespass settlement agreement by the court but with respect no oral evidence was called to determine whether there was a binding agreement between the 1st and 6th defendant.

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[8] Furthermore there is unrebutted evidence in court that there was in fact an appeal to the Court of Appeal in respect of that decision and the appeal was withdrawn by the 1st defendant based on an understanding reached with the Sabah Government (see pp. 63-66 exh. A).

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[9] Accordingly I reject the counsel's contention on the applicability of the principle of *res judicata*.

Issue 2

D *If The Answer To Issue 1 Is In The Negative, Is There A Binding Agreement Between The 1st And 6th Defendant In Respect Of The 50 Acres Land?*

[10] The 6th defendant's contention is simply that since no formal
E agreement was executed by the parties, there was no concluded agreement. This contention is premised on the argument that the negotiations between the parties was 'subject to contract'. Further it is contended that the sublease signed between the 1st and 6th defendant in respect of the 1st defendant's land was the only concluded agreement between the parties to settle the trespass by
F the 6th defendant.

[11] The 1st defendant's contention is that despite the fact that there was no formal agreement signed with the 6th defendant there was a concluded and binding settlement agreement based on the
G conducts of the parties and correspondences between the parties and Sabah State Government. The agreement as stated earlier was these:

1. The 1st defendant is to purchase the 1st defendant's land from the 1st defendant;

H 2. The 1st defendant is to take over and own the 50 acres land in exchange with the development of replacement ponds in Weston to be provided by the 6th defendant;

3. Pending the implementation of the settlement agreement the
I 1st defendant shall allow the 6th defendant to continue with its fishery project on its land without any interruption;

4. Pursuant to item 3, a sublease for a period of ten years was executed between the 1st and 6th defendant at a token rental of RM10,000 per year.

[12] The relevant principles of law governing agreement with the term "subject to contract" is set out in the case of *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679 where the Court of Appeal cited with approval the following passage in *Masters v. Cameron* [1954] 91 CLR 353 (as did the Federal Court in the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625):

> Where the parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract. In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

[13] So, even the employment of the term "subject to contract" does not necessarily prevent a binding contract from arising though the final contract was not signed.

Findings Of The Court

[14] What I have before me is two sets of conflicting evidence and faced with this circumstance I am guided by the principles expounded by Gopal Sri Ram JCA (as he then was) in *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 CLJ 759 on how to address the issue of how contemporaneous documentary evidence ought to be assessed against subsequent inconsistent oral evidence. His Lordship at p. 764 cited with approval the judgment in *Tindok Besar Estates Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 which stated:

A For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence
B requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.

Further on His Lordship also cited with approval the decision in *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaysia) Pte Ltd* [1987] 1 MLJ 257:

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And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have
D regard to the contemporary documents and to the overall possibilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in *The Ocean Frost; Armagas Ltd v. Mundogas SA* [1985] 1 Lloyd's Rep 1 when he said at p 57:

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> Speaking from experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall
> F probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.

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That observation is, in their Lordship's opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

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[15] Similarly, the Court of Appeal in *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324 at p. 330 held that:

In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of
I probabilities but it is also encumbent upon the court to look at all the

surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

...

We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued.

[16] With those principles at the forefront of my mind I now look at the evidence. I start off with the evidence of PW1 - Datuk Haji Abd Ghani Abd Rashid - which is contained in PW1A. His evidence is noteworthy on three fronts. Firstly he was the general manager of the 6th defendant who was in the 'thick of things' so to speak as far as the negotiation of the trespass dispute on the 1st defendant's land was concerned, hence had personal and intimate knowledge of it. Secondly no cross examination was conducted on his evidence and the general rule subject to exceptions is that failure to cross examine on crucial part of the case amounts to acceptance of the witness testimony. Here there is no doubt in my mind what PW1 had said constitute a very crucial part of the 1st defendant's case. Thirdly there is no evidence in court which shows that he is an interested witness in that he stood to gain from the outcome of the case. In fact the evidence points to the contrary. He had left the employment of the 6th defendant in 1983 and had moved on to serve the State of Sabah in other capacities, at one stage served as the Mayor of Kota Kinabalu. There is also no evidence that he held any ill feelings against the 6th defendant. Hence his evidence should *prima facie* be believed unless rebutted.

[17] The 6th defendant in defending this counterclaim called its present assistant general manager. His evidence as rightly pointed out by counsel for the 1st defendant is purely hearsay as he was never as like PW1 in the 'thick of things'. His evidence was based on documents he had in his possession which in my view is inadequate as the crucial evidence of this case is the negotiations carried out by the parties. Again the only witnesses in 'the thick of things' are PW1 and PW3. Hence I find that the evidence of DW1 did not in any way dent the evidence of PW1.

[18] Apart of what I have said thus far, there is in my view ample documentary evidence and conducts of 1st and 6th defendant which corroborate the version of events of PW1 and they are these:

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1. It is undisputed that the 6th defendant had encroached the 1st defendant's land which led to a dispute between the 1st defendant and 6th defendant.

2. Negotiations had taken place between the 1st and 2nd defendant to resolve the illegal encroachment.

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3. The letter dated 7 November 1984 from the 6th defendant to the 1st defendant enclosing the draft agreement to seek confirmation of the terms of the agreement. (p. 14 of exh. A)

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4. The letter dated 15 November 1984 from the 1st defendant to the 6th defendant confirming the terms of agreement. (p. 21 of exh. A)

5. The formal application by the 1st defendant for the 50 acres land to the Director of Land and Survey under PT83010208 made at the behest and blessing of the State Government. (pp. 9-10 exh. A)

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6. A formal sublease entered for a period of ten years for the 1st defendant's land to allow the 6th defendant to continue its operation and at a nominal rental of RM10,000 per year. There is no explanation by the 6th defendant why not a single cent was paid by the 6th defendant to the 1st defendant.

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7. No response by the 6th respondent to a letter dated 26 February 1992 by the Director of Lands and Surveys (pp. 26-27 exh. A) where the director specifically states that even though the title deed to the 50 acres had been issued to the 6th defendant, it did not affect the four decisions stated in the Secretary of Natural Resources' letters dated 24 January 1984 and 25 September 1984.

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8. The evidence of PW2, an employee of the 6th defendant, who had testified that he had to seek the permission of the 1st defendant to remain on the 50 acres land,

9. The letter dated 26 April 1996 from the State Attorney General Chambers to the Director of Lands and Surveys, Kota Kinabalu (pp. 63-64 exh. A) setting out the reason for the withdrawal of the appeal by the 1st defendant in K4/1992 and the terms of the settlement.

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10. It is undisputed that the 1st defendant had taken possession of the 50 acres land in March 1992 with the full knowledge of the 6th defendant who did not object to the same until some six years later in a suit filed in 1998.

11. No disclosure by the 6th defendant to the 1st defendant in respect of the five agreements which they have entered with Bintawa Enterprise Sdn Bhd, the plaintiff herein.

12. It is also undisputed that the 6th defendant is now the owner of a parcel of land in Weston.

[19] I have not mentioned the evidence of PW3 thus far for the simple reason that his evidence may be regarded as self serving. But be that as it may I also find that his evidence had been either unchallenged or corroborated by the evidence of PW1 and PW2 and documentary evidence.

[20] From the above I have no hesitation in finding that the circumstances in this case are within the first two classes of cases set out in *Masters v. Cameron (supra)*. I agree with counsel for the 1st defendant that the fact that the 6th defendant is not interested in buying the 1st defendant's land has no bearing on the agreement reached between the parties. This is a matter of choice for the 6th defendant. As for the development of a replacement pond in Weston the 1st defendant is willing to perform its part of the bargain and the fact that the 6th defendant is not interested in requiring the 1st defendant to perform its obligation is of no significance. It is pertinent at this juncture to note what PW1 says of the agreement as far as benefits to the 6th defendant is concerned. This is what he says:

> 9. To my mind, the benefits derived from this trespass settlement for the 6th Defendant would be:
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> a) The thorny issue of trespass against the 6th Defendant was settled amicably;
>
> b) In addition to taking over the 1st Defendant's land, the 6th Defendant would gain from another bigger piece of land in Weston to be approved by the State Government;
>
> c) They would get a new fish pond of equivalent value in Weston to be developed by the 1st Defendant in exchange;
>
> d) Their fishery project in Kuala Inanam can continue without any interruption for at least 10 years.

[21] This evidence is not challenged for the simple reason that it is not challengeable. By reneging from the agreement the 6th defendant as they say 'had the cake and ate it'. Further the contention of the counsel for the 1st defendant that the reason the 6th defendant reneged from the agreement is that they had secretly entered into Bintawa Enterprise Sdn Bhd is credible and consistent with the surrounding circumstances of the case. Hence it is the 6th defendant who had breached the agreement entered into by the 1st and 6th defendant.

[22] For all reasons stated above, I find that the 1st defendant had proven its case of the balance of probability and accordingly make the following orders:

1. A declaration that the 1st defendant is entitled to possess and remain in possession of the whole of the land held number PL 016290912 as long as it wishes to do so;

2. A declaration that the 6th defendant is estopped from removing the 1st and 3rd defendants from the said land;

3. An order that the 6th defendant do transfer the whole of the interest in the said land to the 1st defendant free from any and all claims and/or encumbrances in accordance with the provisions of the Land Ordinance (Sabah Cap 68) within 30 days from the date of this order;

4. That the 6th defendant be restrained and an injunction be granted restraining it whether by itself themselves or its their servants, agents, attorney or any of them or otherwise howsoever from entering or remaining on the said land and from disturbing or interfering with the 1st defendant's possession and quiet enjoyment of the said land;

5. Costs to be taxed unless agreed to the 1st defendant.